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5 UNITED FOOD AND COMMERCIAL
6 WORKERS LOCAL 1776 &
7 PARTICIPATING EMPLOYERS HEALTH
8 AND WELFARE FUND, et al.,

9 Plaintiffs,

10 v.

11 TEIKOKU PHARMA USA, INC., et al.,

12 Defendants.

13 Case No. 14-md-02521-WHO

14
15 **ORDER ON MOTION FOR
16 PRODUCTION OR PRECLUSION**

17 Re: Dkt. No. 278

18 On November 23, 2015, I heard argument on plaintiffs' Motion for Production or
19 Alternatively for Preclusion. Through that motion, plaintiffs ask me to find that defendant Endo
20 Pharmaceuticals, Inc. has placed "at issue" the following topics:

21 (a) Endo's assessment of the strength of the relevant patents and its expectations
22 concerning the outcome of the patent litigations;
23 (b) Endo's reasons, explanations and intentions for the Payments, and its beliefs about
24 the impact the Payments would have on competition;
25 (c) Endo's beliefs about Watson's final ANDA approval and an at-risk launch by
26 Watson;
27 (d) Endo's reasons or incentives, if any, for agreeing to a generic entry date before
28 September 2013; and
29 (e) Endo's intention to launch an authorized generic version of Lidoderm.

30 Motion at 3.

31 These topics became at issue, plaintiffs assert, because in its discovery responses in this
32 case Endo incorporated a White Paper that it submitted to the FTC defending the *Watson*
33 settlement as procompetitive. In that White Paper, Endo repeatedly explains its subjective beliefs
34 about the strength of the *Watson* litigation and the FDA regulatory proceedings in seeking to
35 dispel the idea that the settlement was meant to delay generic entry into the market. By placing
36 these topics "at issue," plaintiffs contend that Endo has waived any attorney-client privilege or
37 work product doctrine protection for documents and communications regarding them. Plaintiffs
38 ask me to either (i) order Endo to produce documents on these topics withheld under the attorney-

1 client or work product doctrines, or (ii) require Endo to either elect a waiver for certain topics or
2 preclude Endo from relying on its subjective belief and related evidence at summary judgment or
3 trial. Dkt. No. 278.

4 Endo responded at the hearing that it is not placing its subjective beliefs about these topics
5 at issue in defending this case. Endo asserts that it will be able to prove its affirmative defenses
6 under *F.T.C. v. Actavis, Inc.*, 133 S. Ct. 2223 (2013) by relying on objective evidence, such as by
7 relying on the same evidence Endo put on in the *Watson* litigation and expert witness testimony
8 regarding the same, as well as expert testimony regarding the regulatory proceedings. At oral
9 argument, it referred me to the decisions of the Hon. Mitchell S. Goldberg in *King Drug Co. of*
10 *Florence v. Cephalon, Inc.*, No. 2:06-CV-1797 (E.D. Pa.), where in a reverse-payment antitrust
11 case Judge Goldberg identified the parameters of defense experts' testimony regarding defendants'
affirmative defense that their reverse-payment settlement was procompetitive. *King Drug Co. of*
12 *Florence v. Cephalon, Inc.*, No. 2:06-CV-1797 (E.D. Pa.), Dkt. Nos. 861, 888.

13 In light of the defendants' assertion of the attorney-client and work product doctrines,
14 Judge Goldberg intends to preclude defendants' experts from offering opinions as to the antitrust
15 defendants' subjective intent as well as testimony on behalf of a patent holder that a reverse-
payment settlement was procompetitive because it resolved its litigation uncertainty. Dkt. No. 861
16 at 3,12-13, 16; Dkt. No. 887 at 40-41 (excluding expert testimony that he would have counseled
17 generic defendant to have settled Paragraph IV litigation). Judge Goldberg would allow defense
18 experts to testify as to objective economic analysis of the settlement agreements, which
19 presumably is the path defendants intend to follow in this case.¹ *Id.* at 12; *see also* Dkt. No. 888 at
20 2-3 (allowing expert testimony as to Hatch-Waxman administrative framework, legal standards
21 applicable to Paragraph IV litigation, and arguments made by parties in Paragraph IV litigation for
22 the limited purpose of demonstrating on *ex ante* basis the strength of the patent and that patent
23 holder's Paragraph IV positions were reasonable at the time of settlement).

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26 ¹ Judge Goldberg's decisions are somewhat tentative depending upon how the trial proceeds and,
27 in part, upon what the evidence plaintiffs introduce at trial. Dkt. 887 at 12. However, Judge
28 Goldberg allowed the Generic Defendants' experts to testify regarding how litigation certainty
provides pro-competitive benefits for those defendants because that consideration does not
implicate anticompetitive motivations. Dkt. 861 at 17.

1 The parameters outlined by Judge Goldberg seem sensible. At this early juncture in this
2 case, and in light of Endo's express disclaimer of any intent to rely on its subjective belief, I will
3 not find that Endo has broadly placed at issue unidentified documents and communications that
4 would normally be protected by the attorney-client or work product doctrines. Plaintiffs may, as
5 this case goes forward, reassert the waiver issue with respect to specifically identified documents
6 or communications so that I may rule on discrete waiver assertions.

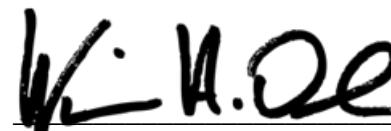
7 I do not agree, however, with Endo's characterization of the White Paper as merely relying
8 on the public record and objective evidence. As an example, Endo repeatedly refers to its
9 confidence related to various litigation-related matters. It is inconsistent for Endo to incorporate
10 its entire White Paper in response to a discovery request and for it now to assert that it will not
11 rely on its subjective beliefs. Accordingly, by **December 15, 2015**, Endo will serve an amended
12 discovery response that redacts from the White Paper all statements of subjective belief on which
13 it does not rely.

14 To be clear, defendants will generally be entitled to assert the attorney-client privilege and
15 work product protection for documents and communications regarding the *Watson* litigation and
16 settlement *only* if they continue to avoid reliance on their subjective beliefs, including expert
17 testimony about their subjective beliefs, in proving their affirmative defenses. Also, along the
18 lines of Judge Goldberg's rulings, defense experts will not be able to opine about Endo's litigation
19 uncertainty. Nor will the experts be able to opine on what they would have advised Endo or
20 Watson to do regarding the status of the Paragraph IV litigation. Defense experts will otherwise
21 be able to opine about the procompetitive merits of the settlement.

22 For the reasons discussed, plaintiffs' Motion for Production or Alternatively for Preclusion
23 is GRANTED in part and DENIED in part.

24 **IT IS SO ORDERED.**

25 Dated: December 3, 2015



26 WILLIAM H. ORRICK
27 United States District Judge